

Social Inclusion, Equality and Respect of Transgenders: Rise of New Socio-Legal Perspective

Prof. (Dr.) Sonia Kaul Shali

Faculty of Criminology and Criminal Justice Administration, Karnavati University, Gujarat, INDIA

soniashali@yahoo.com

Abstract

This article discusses the discrimination faced by certain sections of our society, irrespective of same colour, caste, educational and professional expertise and societal contribution and had to face a lot of disgrace with no fault of theirs. People around the world face violence and inequality and sometimes torture and execution—because of who they love, how they look or who they are. Sexual orientation and gender identity are integral aspects of our selves and should never lead to discrimination or any kind of abuse. Human Rights organizations usually work for lesbian, gay, bisexual and transgender peoples' rights and with activists representing a multiplicity of identities and issues. They expose abuses based on sexual orientation and gender identity worldwide, including torture, killing and executions, arrests under unjust laws, unequal treatment, medical abuses, discrimination in health and jobs and housing, domestic violence, abuses against children and denial of family rights and recognition. The landmark Supreme Court verdict is a major milestone for LGBTQIA-identifying people across the country, where homosexuality was a social taboo and gay people faced endemic discrimination. [1] We have all heard of the renowned Section 377 of the Indian Penal Code, which criminalized homosexuality. However, there are numerous misconceptions regarding its origin and history. This article also aims to bring light to the matter: trace its roots, explain the various controversies surrounding it and introduce various judgments that have been made and legislations that have been drafted with regards to it.

Keywords: Societal Discrimination; Colonial Era; Homosexuality; Privacy and unnatural offences; Historic Supreme Court Verdict; Conservative British Law, new attitude and societal perception

Introduction

'Transgender identity is a Socio-legal approach, carries a lot of sentimental, touching and emotional chapters and needs a lot of psycho-social and legal belief keeping in mind the sensitivity of the subject, relationship between methodological and theoretical approaches as it engages people from all sections of the society and to specifically aim good results. [2] People challenging gender norms have continued to live in almost every culture throughout the time. In other context, the term 'trans' is extremely appropriate in several ways as the people who are well understood by the

general populace are beginning to get closer to them and changing their age-old perceptions to accommodate them in a more pragmatic way. Practically, while defining the word 'transgender' is an umbrella term that incorporates a number of people who live considerable part of their lives expressing an intrinsic sense of gender other than their sex assigned at birth. This includes 'Kinnars' or 'Hijras' who feel like their biological sex fails to reflect their true gender. But due to scientific and technological advancements, we are noticing the impact of new attitude of social awareness in our everyday lives, yet ancient India had already addressed and

resolved this issue many thousand years ago in the course of its own civilization's development. In fact, there is so much to be learnt from previous knowledge regarding the recognition associated with this issue within the societal framework. [3]

In modern times there has been much debates concerning the position and rights of "transpeople" within the society. Should they be given their due? Should they be ignored or denied the basic rights and privileges that other citizen does enjoy? The answers to these questions can be found and thoroughly analyzed when we talk about these issues practically and not for the sake of gaining popularity as they are recorded all aspects of human behavior and knowledge since time immemorial. [4]

There is enough evidence to show that "transgenders" face a lot of disgrace and conspicuous nonexistence from various societal entitlements and schemes provided by the Government. There are efforts being made to address the specific issues aftermath of NALSA judgment in 2014 recognizing transgender as 'Third Gender'. But they still continue to remain at the margins due to stigma and discrimination against them and more explicitly the lesser livelihood opportunities, medical facilities, educational support, better infrastructure model to bring them to the society. Insignificant options force them to resort to pleading and sexual distinctiveness for sustenance. Therefore, they need to be socially protected, given equal opportunities and for seeking positive health behaviours, there is a need for skill development programmes and livelihood opportunities to be created for the under deprived populations .

The Chapter XVI Section 377 of the Indian Penal Code was introduced in 1860. This clearly stated that any sexual activity which is against the supposed laws of nature is a criminal offence and can be punished by law. Arguably, this includes all kinds of homosexual activities as well as transgenders and people with bisexual orientations. Also, the ruling is uniform, irrespective of the matter of consent between the participants in question. As it exists today in Chapter XVI of the Indian Penal Code, Section 377 states:

"377. Unnatural offences—Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."

Explanation — Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section."
(<https://indiankanoon.org/doc/1836974/>)[5]

Section 377 states that any voluntary carnal intercourse done in an unnatural way and perpetrated against a woman, man, or an animal can be punished by law. The punishment in this case involves imprisonment for life. At certain times, the imprisonment may be for a reduced term such as 10 years and the concerned individual/s may have to pay fines as well. As per the law, any act of penetration will be regarded as carnal intercourse and will be sufficient to get the perpetrators punished. Thus, by definition, this law includes all sexual activities that are anal in nature. Even heterosexual activities such as anal penetration and fellatio come under the ambit of this law and as such may be punished.

The Historical Perspective of Section 377 in Courts – A Look Back

- Section 377 has always been under public discussion and debate. Some advocates describe it as retrogressive, and unreasonable law which restrains the fundamental rights of citizens. To get an improved / thoughtful understanding of the law, it is compulsory to trace its history, to understand exactly how the law came to be. [6]

The Buggery Act of 1533

The Buggery Act 1533, passed during the reign of King Henry VIII, stimulated the issue of sodomy from the ecclesiastical courts to the state. The act did not explicitly target sex between men, as it also applied to sodomy between men and women and a person with an animal. Convictions between men for sodomy were by far the most common and well publicized. Convictions under the Buggery Act 1533 were punishable by death. The Section (Section 377) was drafted by Thomas Macaulay around 1838 but was only brought into effect in 1860 in light of the Sepoy Mutiny (First War of Independence) 1857. This law in British India was modelled on the Buggery Act 1533 which was enacted under the reign of King Henry VIII. This law defined 'buggery' as an unnatural sexual act against the will of God and man. Thus, this criminalized anal penetration, bestiality and in a broader sense homosexuality. [7]

Offences against the Person Act 1861

In 1828, the Act was repealed and replaced by the Offences against the Person Act 1828. This Act broadened the definition of unnatural sexual acts and allowed for easier prosecution of rapists, but also homosexuals. This act is what is considered to be the inspiration for

Section 377 of the Indian Penal Code. In years to come this Act would be repealed by the British and replaced by the Offences against the Person Act 1861. [8]

Finally, homosexuality was decriminalized in UK by the Sexual Offences Act 1967. It is interesting to note that while the British government made same-sex marriage legal and in India too, on 6th September 2018, the bench pronounced its verdict and also decriminalized the same sex marriage. According to the verdict, the Apex court reversed its own 2013 judgment of restoring Section 377 by stating that using the Section of the IPC to victimize homosexuals was unconstitutional and henceforth, a criminal act.

The Delhi High Court Verdict of 2009

Over the years Section 377 had sparked numerous controversies and challenged in both the High Court of Delhi and the Supreme Court. Article 21 of our Constitution includes right to privacy also in its sweep which was upheld by our Hon'ble Supreme Court in Kharak Singh Vs. State of UP for the first time. Supreme Court held that right to privacy is an essential ingredient of right to personal liberty. In 2001, Naz Foundation (India) Trust, a non-governmental organization challenged Section 377 in the Delhi High Court by filing a lawsuit to allow homosexual relations between consenting adults. They argued that Section 377 should only be applicable to non-consensual penile non-vaginal sex and penile non-vaginal sex involving minors. However in 2003, the High Court dismissed the case, stating that the Naz Foundation had no standing in the matter (locus standi). This led to the historic judgment in 2009 by Chief Justice Ajit Prakash Shah and Justice S. Muralidhar, which decriminalized consensual

sexual acts between adults. Furthermore, this judgment was to be in force until the Parliament decided to amend Section 377. [9]

Appeals in the Supreme Court

Further, this led to various appeals being made to the Supreme Court, challenging the High Court's authority to change a law. While the Supreme Court dismissed numerous such appeals and the then Attorney General G. E. Vahanvati made it clear that he wasn't planning to file an appeal against the verdict of the Delhi High Court; numerous appeals kept being filed challenging the validity of the judgment made by the High Court. Finally on December 11th, 2012 a panel of two Supreme Court judges overturned the decision that the High Court had made in 2009. The judgment stated that the power to amend the law was with the Parliament and not the High Court, thus their (High Court's) judgment was constitutionally unstable. Thus, the Supreme Court recommended that the Parliament address the matter because only they had the power to amend the existing laws. [10]

May 2008

This was the first time that the case regarding repealing of Section 377 was heard in the Delhi High Court. At that time, the Indian Government was undecided on what to do with the Section with the Ministry of Health and Ministry of Home Affairs differing over the same.

7th November, 2008

This was the final day of hearing for the petition to repeal Section 377, which had been doing the rounds for seven years. The petition received the support of the Union Health Ministry and the opposition of Union Home Ministry. [11]

2nd July, 2009

This was the historical date on which the Section, that had lasted 150 years up till then, was annulled by the Delhi High Court. It also made it possible for consenting adults to have same-sex relationships. When it struck the said section down, it stated that the law was against fundamental rights of individuals. The judicial bench, comprising Justice S Muralidhar and Chief Justice Ajit Prakash Shah, said that if Section 377 was not amended it would be a violation of the Indian Constitution's Article 14, according to which every citizen was equal before law and had rights to equal opportunities. Incidentally, on 12th June 2009. [12]

27th March 2012

Prior to this day, a number of appeals were filed against Delhi High Court verdict. However, the apex judicial body of India did not give a clear verdict on the same. GE Vahanvati, the Attorney-General who had been opposing the said verdict till then, opted not to continue. He said that Section 377 had been forced on Indian society by the Britishers in view of moral values held dear by them.

11th December 2013

On this date, the Supreme Court decreed that homosexuality was an offence and negated the judgment passed by the Delhi High Court that the Section 377 was against the Constitution. The judicial bench noted that in light of the discussions running up to the said verdict felt that Section 377 was not anti-constitutional and the order passed by Delhi High Court's divisional bench could not be sustained legally.

2nd February 2016

This represents a watershed moment in the history of LGBT rights in India as the Supreme Court decreed that all the eight curative petitions filed by Naz Foundation, which has been fighting for repealing the said Section, were checked again by a constitutional bench comprising five members. The judgment was given by Tirth Singh Thakur, the then Chief Justice of India, who headed a bench of three members. [13]

Decriminalization of homosexuality- Rise of new Era

The Supreme Court partially struck down Section 377 and reversed its own 2013 decision restoring Section 377, a controversial British-era ban on consensual gay sex (homosexuality) on 6th September 2018, in a spectacular leap for the gay rights in the country and a rainbow moment in the history of India. Homosexuality is not a crime in India anymore and it is not a mental disorder too. The Chief Justice of India declared the ban is irrational, indefensible and manifestly arbitrary, toasting gay pride. Any discrimination on the basis of sexuality amounts to a violation of fundamental rights. The historical verdict was being cheered by millions across the country, far beyond the gay community, which fought a long battle for decades for the right to be treated equally. As per the rights, respect for individual choice is the essence of liberty and LGBT community possesses equal rights under the constitution. [14]

History owes Apology to LGBTQ for discrimination

The Constitution bench declared the tyranny of Section 377, decriminalized homosexuality with a prayer to the LGBTQ (Lesbian, gay, bisexual, transgender and queer) community

to forgive history for their “brutal” suppression and owes apology to the LGBT community. They were made to live a life full of fear. [15]

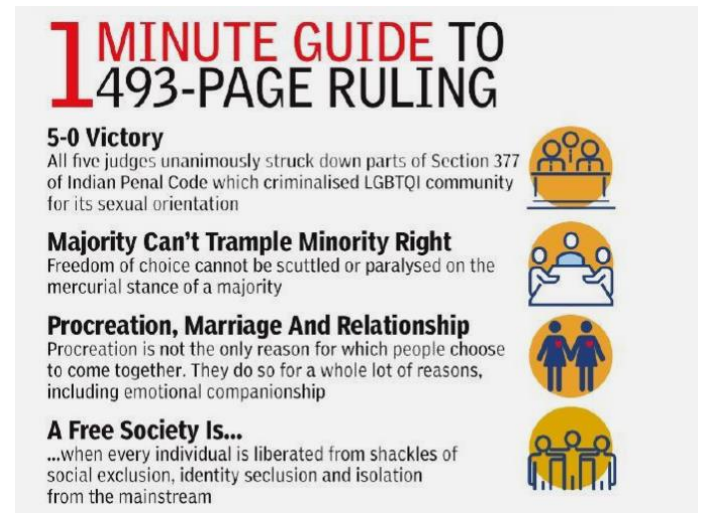
Key points of the historic verdict:

- Sexual orientation a biological phenomenon, any discrimination on this ground is violative of fundamental rights.
- So far as a consensual unnatural sexual act in private is concerned, it is neither harmful nor contagious to society.
- Courts must protect the dignity of an individual as the right to live with dignity is recognized as a fundamental right.
- Section 377 of IPC was a weapon to harass members of the LGBT community, resulting in discrimination.
- Any kind of sexual activity with animals shall remain penal offence under Section 377 of the IPC.
- SC partly strikes down Section 377 as violative of the right to equality.
- IPC's Section 377, which criminalizes consensual unnatural sex, irrational, indefensible and manifestly arbitrary.
- Homosexuality is not a mental disorder. It is a completely natural condition.
- Society cannot dictate sexual relationship between consenting adults as it a private affair.
- Denial of right to sexual orientation is akin to denial of right to privacy.
- Section 377 of IPC is violative of Right to live with dignity.
- India is signatory of international treaties on rights of LGBT and it is obligatory to adhere to treaties. [16]

Emergence of New Thought Process after the landmark verdict 'Fundamental right to live with dignity'

India now joined 124 other countries in legalizing same-sex relations by reflecting rapid social change in India. [17] After the Supreme Court's landmark judgment striking down of Section 377 IPC that legalized consensual gay sex between adults. From the societal perspective, people welcomed this new age transformation related to right to privacy by bringing down the 158-year-old law and found sexual orientation a natural phenomenon and not a mental disorder by stating that Section 377 infringed on the fundamental right to non-discrimination and that the minorities (LGBTQ's) too have the right to live a life of dignity and privacy is guaranteed in the Constitution. [18] Due to this historical verdict, the country exploded in celebrations that were reported in the international media as well. This change in societal perception could be due to economic and technological advancements that have spurred thinking process too. We have now opened a new chapter that had a law on the books criminalizing gay sex. [19] The leading politicians mostly kept themselves away from this debate and respected the apex court's decision by permitting them to do their job. [20] As India, a largely conservative mindset, where leaders of all religions had consistently opposed gay sex, it was altogether a different change in attitude, a different belief that every community, every culture gave their full acceptance. [21] Therefore, it is clear from the above discussion that laws almost always play an important role in changing mindsets and by recognizing the community's right to love, the Supreme Court has restored the

dignity denied to them for a very long time. [22]



1 MINUTE GUIDE TO 493-PAGE RULING

- 5-0 Victory**
All five judges unanimously struck down parts of Section 377 of Indian Penal Code which criminalised LGBTQI community for its sexual orientation
- Majority Can't Trample Minority Right**
Freedom of choice cannot be scuttled or paralysed on the mercurial stance of a majority
- Procreation, Marriage And Relationship**
Procreation is not the only reason for which people choose to come together. They do so for a whole lot of reasons, including emotional companionship
- A Free Society Is...**
...when every individual is liberated from shackles of social exclusion, identity seclusion and isolation from the mainstream

Image Source: [Indiatimes.com](http://indiatimes.com)

Learning Objective

Hence, decriminalization of homosexuality in India is the world's biggest and most impactful gay law reform. [23] With specified and massive Indian population – over 1.3 billion people – this reform is arguably the biggest, most impactful gay law reform in human history. [24] Ending the Indian ban on homosexuality is, of course, just the beginning of a new chapter for the deprived and marginalized sections. There are still massive challenges further to end the disgrace, discrimination and hate crime that LGBTQ people have suffered in India. Even though, more liberal attitudes are on the rise in major cities, in rural and small-town India, where most of the population lives, there is still a lot of ignorance and injustice prevailing on that front. LGBTQ's are at particular risk of so-called 'honour killing' by their families. Sadly, many religious organizations are mostly very unsympathetic to this reform and some have vowed to fight it. Following the Supreme Court's decision, Indian LGBT citizens now

revert to the legal status of non-criminalization that existed prior to the British colonizers imposing the homophobic section 377 of the criminal code in the 19th century.

References:

- [1] The Human Rights Watch
<https://www.hrw.org/topic/lgbt-rights>
(Accessed on 11-9-18)
- [2] Davis, Fogg Heath. Beyond Trans: Does Gender Matter, New York University Press, 2017.
- [3] Sopana, M. A Voiced Cry of Transgenders, Education, 2011, PP. 1-3.
- [4] Un Aids
http://www.unaids.org/en/resources/presscentre/pressreleaseandstatementarchive/2015/september/20150929_LGBTI (Accessed on 12-9-18)
- [5] <https://indiankanoon.org/doc/100472805/>
(Accessed on 12-9-18)
- [6] Holmes, Wendell. The Collected Legal Papers. Dover, New York. 1920.
- [7] British Library
<https://www.bl.uk/collection-items/the-buggery-act-1533> (Accessed on 10-9-18)
- [8] Awaaznation.com
<https://www.awaaznation.com/social-issues/facts-of-section-377-and-traces-of-its-history/> (Accessed on 10-9-18)
- [9] <https://indiankanoon.org/doc/1836974/>
(Accessed on 5-9-18)
- [10] <https://www.livemint.com/Politics/LTVen09Ssk7VO8wKJwTDKO/Supreme-Court-declines-to-limit-its-power>
- [11] <https://indianexpress.com/article/india/section-377-to-be-revisited-timeline-of-the-case-5016095/> (Accessed on 10-9-18)
- [12] <https://timesofindia.indiatimes.com/india/Supreme-Court-makes-homosexuality-a-crime-again/articleshow> (Accessed on 12-9-18)
- [13] <https://www.mapsofindia.com/my-india/society/the-rise-and-fall-of-section-377> (Accessed on 7-9-18)
- [14] <https://www.hindustantimes.com/india-news/once-criminality-of-section-377-goes-so-will-stigma-against-lgbtq-supreme-court/story-w9CoBMdHFeog6Fz2kJHVP.html>
(Accessed on 4-9-18)
- [15] <https://www.thehindu.com/todays-paper/sc-decriminalises-homosexuality/article24887363.ece> (Accessed on 3-9-18)
- [16] https://www.businessstandard.com/article/current-affairs/sc-decriminalises-consensual-gay-sex-key-takeaways-of-the-historic-verdict-118090600405_1
(Accessed on 9-9-18)
- [17] Divan, Vivek. Cortez, Clifton. et. Al. Transgender Social Inclusion and Equality: a Pivotal path to Development. Journal of the International Aids Society. DOI: 10.7448/IAS.19.3.20803 <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4949312/> (Accessed on 2-9-18)
- [18] Shahani, Parmesh. Gay Bombay-Globalization, Love and (Be) longing in Contemporary India, Sage, 2008.
- [19] <https://www.hindustantimes.com/india-news/once-criminality-of-section-377-goes-so-will-stigma-against-lgbtq-supreme-court/story-w9CoBMdHFeog6Fz2kJHVP.html>
(Accessed on 2-9-18)
- [20] The Hindu
<https://www.thehindu.com/todays-paper/sc-decriminalises-homosexuality/article24887363.ece>
(Accessed on 3-9-18)
- [21] Talwar, Rajesh. Inside Gayland, Kalpaz, 2001.
- [22] Mody, Zia. 10 Judgments that Changed India. Penguin.
- [23] Naik. Yashwant. Homosexuality in Jurisprudence of the Supreme Court of India, Springer, 2016. DOI: 10.1007/978-3-309-55435-8.
- [24] Rupkatha Journal, Special Issue on LGBT and Queer Studies, Vol VI, Number 1, 2014.